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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 13 CR 345 (LGS)

TYRONE BROWN
STEVEN GLISSON, a/k/a "D",
ANTOINE CHAMBERS, a/k/a "Twizzie",

Defendants.

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New York, N.Y.
December 11, 2013
10:30 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
AMY R. LESTER
Assistant United States Attorney

PHILIP L. WEINSTEIN
JOHN RODRIGUEZ
Attorneys for Defendant Brown

BALLARD SPAHR STILLMAN & FRIEDMAN LLP
Attorneys for Defendant Glisson
JAMES A. MITCHELL
ELAINE KAYUKI LOU

JOSHUA L. DRATEL
Attorney for Defendant Chambers

(Case called)

MS. LESTER: Good morning, your Honor. Amy Lester, for the government.

THE COURT: Good morning.

MR. WEINSTEIN: Phil Weinstein, for Mr. Brown, your Honor.

MR. DRATEL: Joshua Dratel, for Mr. Chambers, your Honor.

MR. MITCHELL: Jim Mitchell and Elaine Lou, for Steven Glisson.

MR. RODRIGUEZ: John Rodriguez, the CJA attorney assigned today.

THE COURT: Good morning.

Good morning, gentlemen, in the jury box.

We are here to discuss the various motions that have been filed, and I want to take Mr. Brown's motion for new counsel first. I have received from Mr. Brown personally a motion which was filed on ECF but which is dated October 31, 2013, requesting that Mr. Weinstein be replaced, and, accordingly, we've asked Mr. Rodriguez to be here today.

Mr. Brown, I understand that you want a new attorney, and we can make arrangements to do that. I want to emphasize a couple of things to you just to be sure that you understand them before we do that. One is that I know that your difficulty with Mr. Weinstein, based on your letter to me, was

that he did not file certain motions, and I know that that led to a lack of trust on your part, and I understand that and I credit that. The one thing that I need to warn you, though, is that even with a new attorney, he may decide that as a matter of law it's not permissible or there's no basis to file certain motions, and so he may well disagree with you about certain motions. There are even circumstances when a lawyer is not permitted to file a motion in court if there is no good faith basis for it, so he may not even be permitted to file motions that you want to have filed. You just need to understand that having a new attorney doesn't necessarily mean that he will file motions that you think should be filed that he, because he knows the law and the rules of the court, knows can't be filed or advises should not be filed.

Do you understand that?

DEFENDANT BROWN: Yes, ma'am.

THE COURT: The other thing that I want to emphasize is that I really do not want to delay the trial in this matter. I know that you all have been waiting a while, and I think it's important to keep things moving, so I'm going to do everything I can to try to keep the dates that we have agreed to. Of course, I need to talk to Mr. Rodriguez about that. Do you understand everything I've said so far?

DEFENDANT BROWN: Yes, ma'am.

THE COURT: Based on that, do either Mr. Weinstein or

Mr. Rodriguez know of any reason why I should not substitute counsel?

MR. WEINSTEIN: No, your Honor.

MR. RODRIGUEZ: No, your Honor.

THE COURT: I will enter an order substituting Mr. Rodriguez for Mr. Weinstein, and you may be excused, Mr. Weinstein.

MR. WEINSTEIN: Your Honor, I'm handing over the discovery and my card.

THE COURT: Thank you very much. And thank you for your assistance.

Now, Mr. Rodriguez, I know you've just jumped into this, we have a trial scheduled for February 17, 2014, and I very much would like to keep that date. What I'm prepared to do is set motion dates as follows, in the event there are any motions that you and your client decide need to be filed. The motions would be due, any motions, on January 13. Any response from the government by January 23, and any reply by January 28. And then for all counsel, I would have the final pretrial conference on February 7 at 10:45 a.m. It is a good move to look at your calendars.

MS. LESTER: Your Honor, one thing that counsel were discussing before the Court came out was that February 17, I believe, is a federal holiday.

THE COURT: Okay.

MS. LESTER: I think it's President's Day or one of the president's days observed by the court.

THE COURT: Gee, that's odd. I already have three things scheduled that day. Mr. Street, are you able to check?

If it is a holiday, we would start the next day.

THE DEPUTY CLERK: Yes. It's President's Day.

THE COURT: We'll need to move everything that's on that day to some other day and we'll begin this trial on the 18th.

Now what I would like to do is turn to the various motions that the other defendants have filed. I have read and studied all of the papers. I do not intend to take argument, but I will read my opinion into the record.

First, I am going to address Mr. Glisson's motion to sever Mr. Brown's narcotics charge and motion for bill of particulars. After that I will address Mr. Chambers's motion to suppress photo identifications, a motion to suppress cell site historical data, and a motion to dismiss two counts against him as a matter of law. Mr. Glisson and Mr. Chambers, I would note, both seek to join in the other's motions to the extent that it applies to them. Mr. Brown, who has just retained new counsel, has not made any motions, but to the extent any motion made by one defendant applies to any other defendant, I would consider it to be made on behalf of all of those defendants, including Mr. Brown.

First, the motion to sever by Mr. Glisson; he has asked to sever count four of the indictment. The indictment alleges two conspiracies, a robbery conspiracy, and a narcotics conspiracy. All three defendants are charged with conspiracy to commit a Hobbs Act robbery, specifically here, to rob a victim who allegedly was in possession of narcotics proceeds and who allegedly had sold Mr. Brown crack cocaine in the past. The government alleges that the victim was first accosted at Brown's apartment where he allegedly was visiting to collect money that Mr. Brown owed him from their narcotics dealings. All three defendants are also charged with using firearms to further the robbery conspiracy. Two defendants, Mr. Glisson and Mr. Chambers, are charged in a third count with actually committing the robbery in Brown's apartment and at a second location, and Mr. Brown is charged with a conspiracy to possess and intent to distribute 280 grams of crack cocaine.

Mr. Glisson seeks to sever the three robbery-related charges from Mr. Brown's narcotics charge. He argues that he will be prejudiced because the jury may believe that he was part of the alleged conspiracy to sell crack. Rule 8(a) of the Federal Rules of Criminal Procedure provides for the joinder of offenses when they are "of the same or similar character or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." "Joinder is proper where the same evidence may be used to prove each

count." United States v. Blakely, 941 F.2d 114, 116 (2d Cir. 1991), or if the counts have a "sufficient logical connection," United States v. Ruiz, 894 F.2d 501, 505 (2d Cir. 1990).

Here, the narcotics charges have a sufficient logical connection to the robbery charges. The government alleges that the robbery commenced in the Brown's apartment where the victim was visiting to collect money that defendant Brown owed him from their narcotics dealings. Evidence of Brown's sale of crack cocaine is sufficiently related to evidence of the robbery and, therefore, joinder is proper under Rule 8(a).

Even if the offenses are properly joined, in certain circumstances, severance may be warranted. Rule 14(a) provides that where joinder of offenses for trial "appears to prejudice a defendant or the government, the court may order separate trials and counts ... or provide any other relief that justice requires." Federal Rule of Criminal Procedure 14(a). Moreover, Rule 14 "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." United States v. Page, 657 F.3d 126, 129 (2d Cir. 2011).

The defendant must show that nonseverance would result in substantial prejudice, not merely some prejudice. When more than one defendant is accused of participating in the same act or transaction or series of acts or transactions, the federal system expresses a "preference" for joint trials of defendants who are indicted together. A district court should grant a

severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence. Even in those rare instances where a defendant establishes a "high" risk of prejudice, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Zafiro v. United States, 506 U.S. 534 (1993).

"Factors that a district court should consider in deciding a motion for severance include: (i) the complexity of the indictment; (ii) the estimated length of trial; (iii) disparities in the amount or type of proof offered against the defendant; (iv) disparities in the degrees of involvement by defendants in the overall scheme; (v) possible conflict between various defense theories or various trial strategies; and (vi) prejudice from evidence admitted only against codefendants but which is admissible or excluded as to a particular defendant." United States v. Lino, 2001 WL 8356 at *23 (S.D.N.Y. Jan. 2, 2001). Weighing these factors leads me to conclude that severance is not warranted here. The indictment is not complex. The duration of the trial can be measured in days and not weeks. The two alleged conspiracies are separate and not confusingly so. Defendant Glisson's argument that he will be assumed to be Mr. Brown's coconspirator on the drug charges does not ring true. Mr. Glisson's and Chambers's attorneys can

emphasize this fact to the Court, and the Court can as well with a limiting instruction. While there will be different evidence for each count, defendant Brown's conspiracy to sell crack cocaine seems relevant and admissible to the robbery charge since it is factually related to the identity of the victim, the defendant Brown's presumed knowledge that the victim had narcotics proceeds, as well as the other defendant's presumed knowledge that the victim had narcotics proceeds, which they intended to take, and the victim's presence in Brown's apartment, where he was accosted. Thus, the jury is likely to hear this evidence whether or not the narcotics charge is separate from the robbery charge. Therefore, the motion is denied.

Second, Mr. Glisson's bill of particulars. Mr. Glisson seeks a bill of particulars disclosing the names of government witnesses who will testify against Mr. Glisson, the addresses where the conduct took place, and an order that the government provide at this stage of the proceeding any statements concerning the charged conduct in its possession of witnesses and/or victims. The request is denied.

"The proper scope and function of a bill of particulars is to furnish facts, supplemental to those contained in the indictment, necessary to apprise the defendant of the charges against him with sufficient precision to enable them to prepare a defense, avoid unfair surprise at trial, and

preclude a second prosecution from the same offense." United States v. Binday, 908 F.Supp.2d 485, 497 (S.D.N.Y. 2012) (citing United States v. Torres, 901 F.2d, 205 234 (2d Cir. 1990)). "A bill of particulars is required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." United States v. Walsh, 194 F.3d 37, 47 (2d Cir. 1999). If the information the defendant seeks "is provided in the indictment or in some acceptable alternate form" then no bill of particulars is required. U.S. v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987). In deciding a motion for a bill of particulars, the Court should determine whether the defendant has been sufficiently apprised, by means of the indictment, prior proceedings and discovery "of the essential facts of the crime for which he has been indicted." U.S. v. Salazar, 485 F.2d 1272, 1278 (2d Cir. 1973).

Further, while it is true that the "district courts have authority to compel pretrial disclosure of the *identity* of government witnesses ... in the absence of a *specific* showing that disclosure was both material to the preparation of the defense and reasonable in light of the circumstances surrounding the case," a district court need not order the government to disclose that information. U.S. v. Bejasa, 904 F.2d, 137, 139-40 (2d Cir. 1990). A defendant's need for such disclosure is "balanced against the possible dangers

accompanying disclosure (i.e. subornation of perjury, witness intimidation and injury to witnesses)." United States v. Kelly, 91 F.Supp.2d 580, 586 (S.D.N.Y. 2000).

Here, there is sufficient information in the complaint and the indictment to allow the defendant to prepare his defense at this stage of the litigation. In light of the allegations against the defendants, risk of injury to the witnesses is of sufficient concern that I will not require disclosure of witness names at this point. I find it sufficient that the government turn over the names of witnesses and 3500 material a few days prior to trial, as the government has represented it will.

The third motion is Mr. Chambers's motion regarding suppression of a lineup. I will just note that I have asked to have the photo arrays that were used brought to court today. I have them here, and I'll ask a few questions about them in a bit.

Mr. Chambers seeks to suppress witness identifications made in a photo array. Two witnesses were shown a photo array and were unable to make a positive identification of Mr. Chambers, stating that one photo "sort of looked like him." One week later, the witnesses were shown a second photo array with an older photograph of Mr. Chambers in the array. Mr. Chambers's photo allegedly was the only photo that appeared in both arrays. Mr. Chambers argues this procedure was unduly

suggestive. "A prior identification is generally admissible under Federal Rule of Evidence 801(d)(1)(C) regardless of whether there's been an accurate in-court identification." U.S. v. Simmons, 923 f.2d 934,950 (2d Cir. 1991). "Such an identification will be excluded on constitutional grounds only when it is so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law." "Moreover, even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability."

I have here the originals of the photo arrays, and just so I don't have the originals, let me give them back to the government and ask you for copies instead. And if you wouldn't mind just writing on the copies which is which, so I have some idea of what I'm looking at, then I'll read what you've written into the record so that all counsel know that as well.

While you're doing that, let me just continue.

The first step in this analysis is for the Court to decide whether the identification was "so unnecessarily suggestive and conducive to mistaken identification that the defendant was denied due process. Stovall v. Denno, 388 U.S. 293, 302 (1967).

I have looked in the robing room at those photo

arrays. I want to look at them again now, understanding what each one is, to make a finding, if I can, right now, whether or not they are so unnecessarily suggestive and conducive that the defendant was denied due process.

I will be marking these as Court's Exhibits 1, 2, and 3. The first one is a document labeled photo unit array No. 13-341, on the right, and I assume all of you can see that.

Court's Exhibit Nos. 2 and 3 are the same document. The difference is that at the bottom, where it says "date of identification," one lists the time as 11:30, and that is Court's Exhibit 2, and, according to the government, that is the second array that was shown to victim one. And the third document, Court's Exhibit 3, says "1230 hours" in the left-hand corner.

Are we all on the same page? Do we all know what Court's Exhibits 1, 2, and 3 are?

MR. DRATEL: Two and three, your Honor, are --

THE COURT: Two and three are the same document, except that they have a different time.

MR. DRATEL: Right. Two is the 11:30?

THE COURT: Three is the 12:30.

MR. DRATEL: Okay.

THE COURT: My understanding then is that Court's Exhibit 1 contains the picture of Mr. Chambers and Court's Exhibit 2 contains a picture of Mr. Chambers, and because of

that, the argument is that the photo arrays were unnecessarily suggestive, which certainly seems like a plausible argument. I presume that, on Court's Exhibit 2, Mr. Chambers is No. 2. Is that right?

MS. LESTER: That's correct, your Honor, and in Court Exhibit 1, he's No. 4.

THE COURT: Okay. I will confess to counsel that in studying these two documents in chambers, I could not pick out the same person in both pictures. I could not tell that the person who is No. 2 in Court's Exhibit 2 was even the same person as No. 4 in Court's Exhibit 1. Based on that, I do not find that the photo arrays in the surrounding circumstances were unduly suggestive and conducive to a misidentification. Because of that, I do not need to go on to the second step and ask whether the identification evidence nevertheless was independently reliable based on the circumstances because I don't find undue suggestibility in the photo array, so that motion is denied as well.

Now I will go on to the fourth motion here, Mr. Chambers's motion to suppress cell site data. First, I will say that the motion is denied. Under the law as it now stands, I do not find support that Fourth Amendment rights are at stake when historical cell site data is voluntarily disclosed to third parties like cell service providers. While it is true that the Supreme Court has held warrantless

placement of a GPS tracker on a car to be a search under the Fourth Amendment in United States v. Jones, 132 S.Ct. 945 (2012), it did not extend that holding to cell site records held by third parties.

The Second Circuit has not addressed the issue directly but did note in United States v. Pascaul 502 Fed. App'x. 75 (2d Cir. 2012) that admission of historical cell site data is "not plain error," and that one judge's suppression of historical cell site data is "at least in some tension with the law." 502 Fed. App'x. at 80 referring to Judge Garaufis's opinion in In re Application of United States, 809 F.Supp.2d 113, 127 (E.D.N.Y. 2011).

In Pascaul, the Second Circuit cited Smith v. Maryland, 442 U.S. 735, 742-44 (1979) (holding that a customer has no reasonable expectation of privacy in dialed telephone numbers which were conveyed to the telephone company) and United States v. Miller, 425 U.S. 435, 443 (1976) (holding that the Fourth Amendment did not "prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities") citing those cases, the Second Circuit stated that admission of historical cell site data was not plain error.

I agree with the reasoning of Judge Reiss in United States v. Caraballo, 213 WL 4039028 (D.Vt. Aug. 7, 2013), who also was attempting to decide what the Second Circuit would do

in this situation. Her very thorough opinion stated "Smith and Miller thus support a conclusion that a cell phone user generally has no reasonable expectation of privacy in cell site information communicated for the purpose of making and receiving calls in the ordinary course of provision of cellular phone service."

Indeed, Justice Sotomayor, in her concurrence in Jones, which the defendant heavily relies upon in his briefing, admits that the law as it currently stands does not support Fourth Amendment rights in data disclosed to third parties, writing, "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" and citing Smith and Miller. Justice Sotomayor went on to say, "This approach is ill suited to the digital age in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Jones 132 S.Ct. at 945. But the Supreme Court has not yet reconsidered these opinions, and it is unclear on the face of Jones that there is support for applying Fourth Amendment rights to information voluntarily disclosed to third parties. So, on that basis, the motion to suppress the cell site data is denied.

An independent basis to deny the motion is that Mr. Chambers has not established his standing to assert a

Fourth Amendment violation. The defendant is correct that for analytical clarity, the Second Circuit has urged that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." U.S. v. Pena, 961 F.2d 333, 336 (2d Cir. 1992). The Fourth Amendment analysis asks a court to focus on the defendant's reasonable expectation of privacy in the object or place of the search. Here, Mr. Chambers has not established any reasonable expectation of privacy in the data from the target cell phone, as he has not asserted that it belongs to him or even that he used it. "The party moving to suppress bears the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." United States v. Osorio 949 F.2d 38, 40, (2d Cir. 1991). Mr. Chambers has not submitted evidence that his Fourth Amendment rights were violated, so that is a second basis for my denying the motion to suppress the cell site data.

Mr. Chambers argues in the alternative that the evidence should be suppressed because the application for the data failed to meet the Stored Communications Act's "specific and articulable facts" requirement. This is argument fails. The terms of the SCA, as noted by the government, state that the remedies and sanctions for violations of the act are defined by 18 U.S.C. Section 2708, and do not provide for

suppression as a remedy." United States v. Jones, 908 F.Supp.2d 203, 209 (D.D.C. 2012) "(all courts that have addressed the issue have held that the SCA does not provide for a suppression remedy").

Finally, I turn to Mr. Chambers's motion to dismiss. He argues that because the alleged property at issue is contraband -- namely, drug proceeds -- it cannot qualify as property under the Hobbs Act. This incorrect as a matter of law, and the motion to dismiss is denied. I agree with Judge Lynch's opinion in United States v. Thompson, 2006 WL 1738227 (S.D.N.Y. June 23, 2006):

Contraband can be, and often is, the subject of Hobbs Act robberies. "Robbery of contraband may ... support a Hobbs Act conviction." United States v. Martinez, 83 F. Appx. 384 (2d Cir. 2003); see also United States v. Jamison, 299 F.3d 114 (2d Cir. 2002) (upholding Hobbs Act conviction where object of robbery was proceeds from victim's illegal cocaine business).

I think that covers all of the motions that have been filed. The only exception, of course, is if Mr. Brown needs to file any additional motions. Obviously, you should not file any motions on subjects that I have already covered because you know what my rulings are and they apply to Mr. Brown as well.

Is there anything else?

MR. MITCHELL: Yes, your Honor, just briefly.

I know you ruled on the bill of particulars motion.

We had made a request under Rule 16 for early production of the statements of some of the victim statements, even if in redacted form, to allow us to potentially use those in our own motion with respect to the photo array or, frankly, to use them in preparing the defense. I'm not sure your Honor ruled on that. If so, I didn't hear it.

THE COURT: Just for clarification, the motion is denied. I think the case law make clear that 3500 material is not intended for use for advance preparation for trial, and I think the government also has agreed to produce it prior to the trial, only several days rather than immediately.

MR. MITCHELL: To that end, your Honor, I was wondering if your Honor typically would set a date firm as to when before February 18 the government would be obligated to produce that material.

THE COURT: I'll hear from the government on that.

MS. LESTER: Your Honor, I anticipate that we'd certainly be able to turn it over no later than the Thursday before trial, whatever that date is, and potentially earlier if there's a particular concern of defense counsel. We are sensitive to not wanting to cause any delay of the trial in their review of materials. But at this point the 3500 material is not voluminous at all, and I think that providing it the Thursday before a Tuesday start date would be sufficient.

THE COURT: Can we compromise and say a week before?

Is that okay?

MS. LESTER: That's fine, your Honor.

THE COURT: Let's do it on the 11th. The 3500 material will be produced then.

MR. MITCHELL: One more question, your Honor.

Do you have the schedule or will you set a schedule when we will have the *in limine* motions pretrial?

THE COURT: Yes. I would like to address any *in limine* motions at the final pretrial conference, if I can. I obviously may need to wait for trial. I would like them to be fully briefed by the time we have the final pretrial conference. We can back into the dates right here so there's no confusion.

MR. MITCHELL: Great. Thank you.

THE COURT: Why don't we do the *in limine* motions on the same schedule as we're doing Mr. Brown's pretrial motions. You should have those dates, but we'll put them in an order. Motions by January 13, responses by January 23, and reply by January 28.

My strong preference would be to receive a courtesy copy from the party who is filing the motion of all of the papers, similar to a practice I have in my individual rules on the civil side, and you can look at that. But basically if you're bringing a motion *in limine*, you would be sending to my chambers a paper copy in a binder that has all of the briefs

for a single motion together and in order so I can read them, and if there's some way to get those all in one binder or just in a couple, that would be my preference.

MR. MITCHELL: If we're making the motion, we will serve a courtesy copy on the government.

THE COURT: Exactly.

Anything else?

MS. LESTER: Your Honor, in terms of requests to charge and voir dire, when would the Court like to receive those?

THE COURT: I would like to get those also before the final pretrial conference. I think I have something in my individual rules, but I don't, frankly, recall what the timing is. Why don't I ask for those February 3.

MR. DRATEL: May I make a suggestion.

THE COURT: Yes.

MR. DRATEL: Previously, in other cases it seems to me the best practice, most efficient practice is the government would provide us in a Word document its proposed requests to charge and we would do our track changes so the Court can see.

THE COURT: That would be great.

MR. DRATEL: Rather than having to remerge them.

THE COURT: In fact, if you can agree on requests to charge, that would be even better. If you could try to do that, I would really appreciate it, and to the extent you can't

agree, something tracks changes noting your objection why, that would be very helpful.

MR. DRATEL: 85 percent of it will probably be agreed on.

THE COURT: All right. Is there anything else we should address here? If anything else comes up, the best way to communicate is by letter sent to my chambers and e-mail a copy to all counsel. Thank you very much.

(Adjourned)